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"Making Law for Mass Cases"

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Mass torts, constitutional cases brought on behalf of groups, and other forms of mass litigations require the making of law by lawyers and judges. Some believe that lawyers and judges do not make law. That concept is a myth. It is equivalent to the myth of the emperor who walked the street naked, but was complimented by his subjects on his stylish clothing.

Every judge understands that his or her role is making law when required.

That had been true in the English tradition - - and thus in the American - - since ancient times. Lord Sir Edward Coke and his colleagues were involved in wrenching England out of medieval times, making much of the modern common law that you studied in law school. The King's courts were wresting jurisdiction from the various manorial and religious courts, bringing them under the control of the central court system in London, using and developing the King's writs to define substantive law and procedure.

Parliament enacted statutes which modified the common law. Yet, land law, tort law, contract law, and procedure were primarily developed by the judges. Their robes partly concealed the fact that they were creating law. The theory was platonic: there was a preexisting inchoate common law. And the judges opened their mouths, and it was uttered. Thus the myth:

judges did not make law; they were only conduits for what was preordained or enacted by the legislature.

In this country, American lawyers and judges, even after Abraham Lincoln practiced, carried in their saddlebags the monumental William Blackstone's Commentaries on the Laws of England, in its original and many American editions.

The most adept judicial lawmaker America has had was probably the wily Chief Justice John Marshall. He was a soldier in the Revolutionary War, and a member of the Constitutional Convention. As the Chief Justice of the Supreme Court, he was a thorn in the side of President Jefferson because of his exercise of law-making powers in his conducting of the Aaron Burr trial and other legal disputes.

In the early period of United States history, when it was not yet clear what the roles of the legislature, the courts and the executive were, the Chief Justice, in *Marbury v. Madison*, declared that the federal courts had a central law-making role because they could declare statutes unconstitutional. He developed the third branch as a very powerful institution in a way that could not be challenged.

In more recent times, the Supreme Court has continued making law. It must make new law in order to prevent our governmental system from breaking down as it faces enormously changed - - and ever-changing - - social, technical and legal problems.

The United States Constitution itself resulted from a series of critical compromises, many between small states and big states, with respect to how power would be shared between the

central government and state governments, and with respect to what the powers of all governments would be vis-à-vis the people and private institutions. Every part of this founding document was a result of give-and-take agreements that resulted in ambiguity requiring interpretation, and thus lawmaking. The drafters left us with obscurity and flexibility because they could not otherwise have achieved agreement.

The Bill of Rights itself reflected compromise. It was not in the Constitution. It was inserted after adoption of the Constitution by the people, because in a number of the states, ratification would have failed without some explicit civil rights protection. The first ten amendments that help define our government and our aspirations contain open-ended language like "due process" - - creating ambiguity that the courts and others have had to interpret and apply.

The President has the power to interpret our laws. The legislature has the power to interpret and change our laws. And the courts have the power and obligation to interpret - - and modify - - our laws when they are deciding cases.

We live by the fundamental common law that Oliver Wendell Holmes referred to in his book on the common law. We have the written Constitution. We have statutory laws. Benjamin Cardozo in his famous Yale lectures candidly told us how responsible judges make and develop judicial law.

Anybody who has drafted legislation, as I did for many years in Albany, knows that statutes are sometimes written ineptly, leaving openings for interpretation. But sometimes the law is drawn very expertly to permit future construction and clarification in its application to real

life events and problems. If you must have a piece of legislation passed on a subject, and a large group insists that it should say "White," while another group whose votes are needed are adamant that it say "Black," the scrivener writes, "somewhat like White and somewhat like Black." And what does that mean? It means the courts will ultimately decide what is in this grey area. If the legislature does not like the court's interpretation, it can modify the statute and make it more precise.

Take, for example, the United States Sentencing Guidelines. The Sentencing Guidelines resulted from compromises between liberal and conservative wings in Congress. As originally designed by the Sentencing Commission, many of us believed they would not work well. So the Supreme Court - - led by Justices Scalia and Breyer - - relying on a stunningly exotic interpretation of the Constitution, stepped in to create a more appropriate, rational, and useful system under *Booker*.

And then we have all the current federalism problems. Should the states have power A or should they not? Every one of the notable Chief Justices and other great Justices have interpreted - - have even manipulated - - the laws in order to achieve some kind of consensus on the Court about the direction in which the country should be going. What Chief Justice Marshall did provided the federal judiciary with the power to contribute to and to reflect our nation's continuing change and development.

We have what was done in *Dred Scott* by Chief Justice Taney and his court. It made basic law that was not acceptable to much of the nation, and helped lead to the Civil War.

We have what happened with the 13th, 14th, and 15th Amendments, which prevented, as first interpreted, full integration into our society of African-Americans for over one hundred years.

We have what happened in the commercial area after the Civil War, where the state courts helped the railroads and other commercial enterprises at the expense of workers and property owners who were harmed, but denied recovery.

We have the courts in the early 20th Century who refused to help, on Constitutional grounds, or to allow the states to help, women, children and other workers.

We now have important developing judge-made law that is based upon changing technology, changing social views, changing political views and a fundamental change in a rural nation of three million when the Constitution was adopted to more than 300 million in an urban society today.

The law must be altered constantly to reflect these changes - - birth control, computers, new modes of transportation, and revolutionary methods of communication. Some law, like that governing real property or wills, is of course less flexible, because of the greater need for predictability.

Seasoned practitioners understand that in every generation, major areas of the law turn over. How, for example, are we going to handle all of the new and fast-developing problems of copyright and all the new issues of intellectual property unless the courts make law when Congress fails to step in?

What did Cardozo do? He redefined the whole tort law with the *Buick* case. The judge I worked for, Stanley Fuld, Chief Judge of The New York Court of Appeals, understood that judges should generally take small steps. Nevertheless, he rewrote the law of conflicts and defined (in a dissent, later followed) when people are entitled to equal access to publicly funded housing, whatever their color or background or ethnicity.

Any of you law clerks who are in any of the chambers in this court see what the judges are doing. There is not a day that we do not say, "Gosh, that's a new problem." Or, we do not know what to do with governing law as it stands in light of new facts. Making the law, with the help of lawyers and others, is essential. Eventually, we tweak it enough so it goes in one direction or another. Many interstitial changes can ultimately span a wide chasm.

The question is not shall we make law, but what are appropriate limits, and how is the power to be exercised? The superb law school system that we have in this country plays a significant role in answering these questions. The curriculum introduces you to the traditions that inform what we do, recognizing that it is the legislature which has primary obligations to make our laws, the executive to enforce them, and the citizenry to provide a general consensus on their legitimacy.

Are we going to help sick, poor people? Are we going to proceed on principles of equal opportunity or solely on merit in our schools? To what extent? Are we going to do something more to protect legal rights of illegal immigrants?

Sound decisions can go either way. They depend in large measure on tradition, on what Congress has done and what the states are doing. Still, the courts have always played, and must play, a critical role in law-making.

When Chief Justice Rehnquist and his Court reinterpreted the words of the 11th Amendment so it scans in a way that seems strange, but did it for the sensible reason that this reading changes the balance of power between the states and the federal government back towards an original conception, the result could be justified. The interpretation gives more power to state government as against federal authority. This changing balance has presented a quandary for us since the day that the people who wrote the Constitution fudged the concept of federalism in order to produce a document that could be adopted. If they had made hard-edged decisions, we never could have had a unified nation.

The institutions in this country are enormously complex: we have governmental agencies making regulations; legislatures of the nation, of states, and localities; federal and state judges; and the powerful academic and media communities. Ours is a complex multi-centered structure of power and influence. It works fairly well because of its flexibility and the fact that when push comes to shove we generally do not march in the streets and throw rocks. We do what the courts say we should do.

So what does all this have to do with mass torts? This: judges have made much of the law of mass torts, and are still making it. It starts at least with the *Buick* decision of Cardozo that limited the role of privity and provided a rationale for suits by large numbers of people related to each other only in the way that they were injured.

Judges have had to make law with respect to the developing field of mass torts. Mass torts are like the computer: a relatively new phenomenon. Litigation under the common law developed on a one-on-one basis - - one plaintiff and one defendant. A horse carriage runs into another horse carriage; somebody makes a contract with another person. Cardozo recognized that we have to go beyond that, not only to protect the person who contracted for a car that has a bad wheel that flies off and hurts the owner. It also needs to protect all those people out there who may be hurt by defective wheels and by other products that may be dangerous to third parties.

We have a modern complex industrial structure with difficult questions of safety, cost and utility, as in pharmaceuticals, partially controlled by the states, partially controlled by the federal government, partially controlled by private associations and academics, partially uncontrolled.

Many injured people can be affected by decisions over which they have had no control. And they are disaffected because they cannot protect their own safety. So what should the law do for them?

We have a tradition that everybody controls his or her own case. But that does not always work in mass torts. In the Zyprexa cases in this court, 30,000 people are making claims for personal injuries; hundreds of thousands of people may have been affected by a medicine for psychiatric problems, with - - like so many pharmaceuticals - - side effects that were not foreseen, or if foreseen, were covered up. What can and should the courts do? Almost all

pharmaceutical products present secondary dangers. All kinds of other products present dangers: breast implants, asbestos, herbicides.

Asbestos was used a few blocks from here at the Brooklyn Navy Yard during World War II by 17-year-old boys who were waiting to be drafted. They worked in new aircraft carriers, up to their hips in asbestos, breathing it in. The government, including the President, knew that these young people were at risk. It concluded, "we need the ships now." I do not fault the government. It also sent into battle hundreds of thousands of men that they knew were going to be killed as part of the war. But the question is whether and how to pay when these men are now dying from mesothelioma. Should there be payment for the injuries asbestos may have caused? Or should we ignore the issue and let the costs lie with injured? No statute provides a clear answer. The courts must decide.

Judges can have different views of rights and related problems. Whether someone is an "active" or "passive" judge, when he or she moves the law forward or back or sideways or not at all, that judge is making law.

Our judicial duty with respect to mass torts is to help the legislature, industry, non-governmental agencies, lawyers and academics devise and apply appropriate substantive law, procedural law, statutes of limitations, and a whole panoply of legal practices and limits, that will enable us to deal with these massive problems, while at the same time protecting due process of individuals and institutions. We must at the same time safeguard rights of defendants and give plaintiffs a sense that they are participating in the legal process, not just being herded about without any control by themselves over what is happening to them in our courts.

The class action device furnished a useful model. It is based on the rules of equity dating back to the 13th Century. Equity principles were relied upon by hundreds of thousands in the asbestos cases and in many of the mass tort cases tried in this court. Judges have looked to ancient equity for precedents, and they have had to develop new techniques - - use of special masters and application of modified theories of liability and remedy, and coordination of the work of those claiming injury with each other and their lawyers.

The class action became *too* effective in the view of some. Some defendants thought it gave plaintiffs and their attorneys excessive power. Relatively small individual cases which were very expensive to try - - requiring an enormous amount of capital, skill and other resources - - could be brought on behalf of a class to protect a large group against what are referred to as "repeat players," institutions on the defense side which have substantial capital and resources. Class actions moved towards equalization of power in the courts.

Now there is an attempt to reduce plaintiffs' advantages in class actions by those who think that the pendulum has swung too far towards plaintiffs and the plaintiffs' bar. Groups on all sides of the issue have reasonable interests and concerns. More equalization through robust class action and other consolidating mechanisms is desirable, with some limitations. But we can understand why some feel we have gone too far in allowing suits. Doctors do not want to be sued; they say it costs more to practice defensively, and so on. You know the arguments.

Some say these problems should be handled administratively. There should be more effective administrative control of the air and water and pharmaceuticals and products used by consumers, and the like.

Yet, the failsafe institution of the courts constitutionally has the obligation to protect the injured. Where nobody else is doing the job, the courts must step in and utilize processes that fairly and efficiently handle mass cases.

The recent federal Class Action Fairness Act was designed to reduce the impact of class actions and their availability in plaintiff-friendly state courts by bringing national class actions into federal court. Changes in the Federal Rules of Civil Procedure, primarily to Rule 23 that deals with class actions, and decisions of the Supreme Court and Courts of Appeals on pleading and other rules, have dealt a severe blow to class actions.

As you know, in the asbestos cases, where there was an attempt to settle large groups of related claims, the plaintiffs' attorneys overreached. They acted unethically by protecting a few clients at the expense of the rest of the class. But, in rightly rejecting these settlements, the Courts of Appeals and the Supreme Court so restricted class actions that all mass actions - - including those critical to protect the vulnerable and injured - - were adversely affected.

In addition to class actions, there are other devices for dealing with mass torts. I suggest that you look at the American Law Institute's project, "Principles of the Law of Aggregate Litigation," and the Federal Judicial Center's Manual for Complex Litigation to appreciate how much of this law is judge-made.

There are, for example, consolidations. In the Zyprexa case, the parties are using a form of consolidation. The federal Multi-District Litigation Panel sends all the cases from across the nation to this court. Some 30,000 have been settled. Some are set for trial. Some are before the court on summary judgment motions. The claims include those of every one of the states and the

federal government for liens on every settlement that has been reached, to retrieve money that state governments paid to treat poor people and others. It includes claims for many billions of dollars by the federal and state governments. And it includes an enormous number of claims for third party payors like unions and insurance companies under state fraud laws and under the federal RICO statute.

Under many states' laws, every time something is sold with a false or inadequate representation, a separate fraud is committed. And a separate penalty may be imposed. If, in a state where there have been issued millions of prescriptions, each one of them is the basis for a thousand dollar fine, you will understand the possibility of hundreds of billions of dollars in claims. We want to protect the injured. But, we do not want to bankrupt our main producers of pharmaceuticals.

Some mass cases have to be handled by trial. There is no other way to deal with them. *Brown v. Board of Education* had to be tried. It had to be tried in a number of states. And, then it was tried over and over again in connection with the remedy. Many cases involving reapportionment and voting have to be fully adjudicated.

The bulk of mass tort cases have to be settled. If we tried 30,000 Zyprexa cases, when we are now trying in federal court in a year a total of under 2,000 civil jury cases, it means that we would need a federal court structure many times larger than we have.

We must settle most of these mass cases. We have to provide procedures for handling them on a mass basis that are fair to everybody.

We have had a number of such cases in this court. Some of them have been handled successfully, some of them badly. We handled in this court and the Southern District fairly successfully the breast implant cases. A judge of that district and one from this court sat down together. They held joint *Daubert* hearings. They found the plaintiffs' breast implant claims of vast neurological and other damage were scientifically unproved. As a result, the breast implant cases brought here were quickly settled because there were not many valid claims.

In the asbestos cases, we have spent hundreds of millions of dollars unnecessarily. Congress refused to act by providing a useful procedure. It has done so in the child vaccine cases. We could have distributed asbestos money more effectively, but we did not.

We have had many different kinds of mass tort problems. Each one of them has to be approached differently - - problems like 9/11 assigned to Ken Feinberg, Agent Orange, credit cards, school and fire fighters discrimination.

The Diethylstilbestrol (DES) cases provide a useful example. They resulted from the use of a drug, some 40 years ago, designed for women who were pregnant and at risk. Many of these women discovered many years later that their daughters' reproductive organs had been adversely affected. (Compare thalidomide, which you remember was a drug that affected fetuses, causing the shortening of limbs of so many people in Europe, but fewer in this country because our Food and Drug Administration was more protective here.)

The statute of limitations was a problem because the DES daughters did not find out why and how they were injured until after many years. To allow these cases to proceed, the courts

and legislature developed necessary changes in the law, including application of a discovery rule rather than a causal event rule.

How do you deal with the problem that most diseased daughters, even those who had mothers who were still alive, did not know who produced the drug that caused them harm? It was manufactured by a score of companies. Which company's drug did a mother take? You could not tell in most of the cases - - an absolute barrier under traditional tort law. How was that to be handled?

The highest courts in New York and California developed a new tort model. They made new law. They said, we don't know who did it, so what we're going to do is take all of the drug made in the year that a woman took it, find out what proportion of the drug was made by each company, and assess each company with a percentage of the damages equal to the percentage of the DES drug they produced. This change has worked well. The manufacturer will statistically pay only for the damage that it actually did, while the injured plaintiffs will receive fair compensation. What the courts did in making new law was eminently sensible.

We tried a number of DES cases in this court. Those trials set the standard for what the remaining cases were worth in settlements.

This court did much the same in Agent Orange. It said, we do not know whose herbicide was in the drum that was sprayed on a particular soldier, or even if any of it fell on him. We do not know what caused his cancer because his cancer could have been caused by other things. So the Court relied upon the law of large numbers and a statistical average to spread damages and

recovery. The cases were settled, resulting in an insurance-like recovery for hundreds of thousands of veterans and their families.

The Court of Appeals refused to follow the statistical DES approach in the cigarette cases. Its ruling was partly justified by the fact that it was state law that was being applied, and federal courts shy away from changing substantive state tort law under *Erie* - - though certification of state law questions by federal courts to a state's highest court help. The federal courts were not so limited in interpreting federal civil statutory RICO claims, but they took a conservative position. They said there was damage but no remedy under traditional tort law.

Do courts make law? Of course they make law. Should they not have made law in the DES cases? If they had not made new law they still would have made law, the law being that if you suffered from this defect as a result of the drug your mother took there was nothing the courts could do for you.

When the Supreme Court says the statute of limitations for women who are denied the same wages as the men sitting next to them requires that they sue immediately, and if a woman finds out ten years later that she was cheated for ten years, she is too late, is it making law? It is a justifiable rule to protect industry against stale claims, but it is the making of law. We had a 5-4 split in the Supreme Court on the matter. Now the federal legislature has passed a bill which has gone along with the Court's minority to better protect women from longstanding discrimination.

Are there any questions?

Clerk: Do you think that there's a counter-argument to strict constructionism or original meaning as a tool for interpreting the constitution?

JBW: Strict constructionism is useful sometimes. Justice Scalia has utilized a form of strict construction to protect criminal defendants in recent rulings. Our hearsay rules were changed by him and his colleagues in defendants' favor. And they have assisted defendants in sentencing matters as in *Booker*, relying on originalism and Eighteenth Century English jury practice. Sometimes the technique is a construct: knowledge of the history often is dubious.

We try to do the best we can. We must recognize changes in technology, changes in sociology, changes in our political system, changing relationships between state and federal governments, and changes in international relations through treaties. The law has to sensibly deal with these real life changes in this enormously diverse country.

Our legal future depends on the respect we give to our legal traditions incorporated in the phrase "the Rule of Law." Having watched our law clerks at work, I have faith that their judgments will be at least as good as those of their predecessors in making law - - as well as in applying it as uncorruptible neutral "umpires" between the parties before us.